

STATE OF MICHIGAN
COURT OF APPEALS

ALAN W. HAXTON,

Plaintiff/Counterdefendant-
Appellant,

v

PATRICIA S. HAXTON,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

November 18, 2003

No. 241191

Oakland Circuit Court

LC No. 01-652770-DO

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff Alan Haxton appeals as of right from a judgment of divorce. We affirm.

I. Basic Facts And Procedural History

The parties married on October 21, 1978, and were married for twenty-three years. The only child of the parties' marriage is a twenty-two-year-old daughter who attends a graduate program at Michigan State University. Patricia Haxton has an adult son from her prior marriage. At the time of trial, Alan Haxton was fifty-four and Patricia Haxton fifty-two. Patricia Haxton was diagnosed with carpal tunnel syndrome and expected to undergo surgery in February 2002.

Alan Haxton worked as an engineer for Ersco, Inc., where he earned a base salary of \$75,000 in 2002. No bonus was anticipated. His employment history showed earnings of \$54,000 in 1997, \$61,000 in 1998, \$76,000 in 1999, and \$81,000 (including a bonus of \$6,000) in 2000 and 2001.

Patricia Haxton was a licensed and certified dental hygienist and worked part-time for approximately twenty years during the marriage. She earned \$32,600 in 1999 (including \$17,800 interest earned on an inheritance account in 1999), \$38,700 in 2000 (including \$20,000 interest earned on the inheritance account in 2000), and \$18,500 in 2001. She claimed that carpal tunnel syndrome hindered her ability to increase her work hours and income.

Assets acquired by the parties, and subject to distribution, include the marital home, which was appraised at \$320,000. The parties also owned a cottage worth approximately \$150,000. During the marriage, Patricia Haxton received an inheritance of cash, stocks, and

bonds from her family valued at approximately \$221,336. While the parties used the cash from the inheritance, they maintained the stocks and bonds in a brokerage account with automatic reinvestment of interest earned. Alan Haxton acknowledges the original inheritance as Patricia Haxton's separate asset, but claimed a marital interest in the appreciated value.

The only marital debt, aside from the mortgage on the marital home, was a \$33,000 home equity line of credit. Alan Haxton removed the monies from the equity line before leaving the marital home and without Patricia Haxton's knowledge or permission. Alan Haxton alleged that the majority of the monies from the line of credit were used to pay educational expenses for the parties' adult daughter and routine marital bills.

Patricia Haxton alleged physical and verbal abuse by Alan Haxton during the marriage, but there are no medical records or police reports substantiating these claims. Patricia Haxton also asserted that Alan Haxton had an affair during the marriage. Alan Haxton acknowledged, at the time of trial, that he was living with an unrelated female, but denied being unfaithful during the marriage or prior to the separation of the parties. He moved out of the marital home in March of 1999. The trial court specifically refused to assign fault to either party for dissolution of the marriage.

II. The Trial Court's Findings

A. Standard Of Review

We first review the factual findings of the trial court for clear error regarding property division in a divorce judgment.¹ If the findings of the trial court are not clearly erroneous, we then determine whether the dispositional ruling was fair and equitable under the circumstances.²

B. The Inheritance

Alan Haxton alleges an interest only in the appreciated value of Patricia Haxton's inheritance.³ The basis for his claim is his payment of routine marital expenses and contributions to their daughter's educational needs, which permitted the inheritance to accumulate through reinvestment of interest and the absence of withdrawals, as well as payment of taxes on interest earned on the account. In making any distribution, the court must first distinguish between marital and separate property.⁴ Typically, marital assets will be divided, but each party will

¹ *Sparks v Sparks*, 440 Mich 141, 160; 485 NW2d 893 (1992).

² *Id.*; *Olson v Olson*, 256 Mich App 619, 622; ___ NW2d ___ (2003).

³ We note that the dissent addresses the issue whether the inheritance itself retained its status as a separate asset. However, because Alan Haxton did not raise this argument on appeal, we decline to address it. See *Mahnich v Bell Co*, 256 Mich App 154, 164; 662 NW2d 830 (2003).

⁴ *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997).

retain their own separate estate.⁵ Here, the trial court determined that Patricia Haxton's inheritance, and its appreciated value, were her separate asset.

The separate estate of a spouse is only subject to distribution if one of two statutory exceptions is met.⁶ MCL 552.23(1) permits invasion of a separate asset if "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party." To qualify for this exception, a party must demonstrate need.⁷ The second statutory exception to noninvasion of separate assets is contained in MCL 552.401, which permits distribution if the other spouse "contributed to the acquisition, improvement, or accumulation of the property."

Alan Haxton did not allege need for additional support. His earnings have been at least double those of Patricia Haxton. Therefore, there is no basis for invasion of a separate asset under MCL 552.23(1).⁸ Alan Haxton instead relies upon MCL 552.401, alleging his assistance in payment of taxes for interest earned on the inheritance and payment of other routine marital and educational expenses for the parties' adult daughter contributed to the growth of the account and made the appreciated value subject to distribution as a marital asset.

A separate asset will only be invaded under MCL 552.23(1) if the other party "significantly assist[ed] in the acquisition or growth of" that separate asset. In this case, the trial court did not clearly err in finding that the appreciated value of Patricia Haxton's inheritance should not be invaded. First, support of an adult child's educational expenses is not a proper consideration for the court in evaluating support or property distribution factors.⁹ Second, contribution to the payment of taxes on interest earned for an asset determined to be a spouse's separate estate is too indirect and minor to support invasion of the asset under the standards of MCL 552.401.¹⁰ Finally, the growth of the asset was merely passive. The parties did not contribute additional marital monies to the account. Growth of an asset based on passive reinvestment of interest and an absence of withdrawals is factually distinguishable from the provision of services and contributions that actively result in the increased value of an asset.¹¹ We conclude that the trial court did not err in determining that Patricia Haxton's inheritance, and its appreciated value, were her separate asset.

⁵ *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1998).

⁶ *Id.*

⁷ *Id.*

⁸ *Davey v Davey*, 106 Mich App 579, 583; 308 NW2d 468 (1981).

⁹ *Lesko v Lesko*, 184 Mich App 395, 405; 457 NW2d 695 (1990).

¹⁰ See *Grotelueschen v Grotelueschen*, 113 Mich App 395, 401; 318 NW2d 227 (1982).

¹¹ See *McNamara v Horner*, 249 Mich App 177, 184; 642 NW2d 385 (2002). See also *Reeves*, *supra* at 496-497 (including as part of the marital estate appreciation of assets that were actively managed during the marriage but excluding those that appreciated only passively). *Dart v Dart*, 460 Mich 573, 585 n 6; (distinguishing between appreciation of active and passive investments for inclusion in marital estate).

C. The Home Equity Loan

Alan Haxton also alleges error, based on principles of equity, in the award of responsibility for payment of all debt for the home equity loan to him. He acknowledged his withdrawal of \$33,000 without Patricia Haxton's prior consent or knowledge. He testified the monies were used to pay educational expenses for the parties' adult daughter and to cover various bills associated with routine marital expenses and the establishment of his separate residence.

Factors to be considered in the distribution of marital assets include: (1) duration of the marriage, (2) contributions to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities, (8) past relations and conduct, and (9) general principles of equity.¹² A property division is not required to be mathematically equal,¹³ but should be fair under the circumstances of the case.¹⁴

Our review of the trial court's distribution of marital assets does not support Alan Haxton's allegation of inequity. The parties receive almost identical cash value from the distribution of marital property. Alan Haxton does not assert an interest in Patricia Haxton's base inheritance, but uses the entire value of the account in his claim of inequity. Further, based on the requirements of the distribution, the liquidity of Patricia Haxton's award is greatly reduced while her potential expenses are substantially increased. Alan Haxton had the exclusive use and control of the home equity monies, his testimony regarding the use of the monies varied considerably, and he failed to include his share of the debt in his proposed apportionment. Therefore, we affirm the trial court's distribution.

III. Spousal Support

A. Standard Of Review

Alan Haxton contends the trial court's award of temporary spousal support to Patricia Haxton and contribution to her COBRA¹⁵ benefits was in error. A trial court may exercise discretion in awarding spousal support.¹⁶ The purpose of spousal support, based upon what is reasonable and equitable under the circumstances of each case, is to obtain a balance between the parties regarding their earnings and financial needs in a manner that does not subject either party to poverty.¹⁷ Factors considered in a determination of an award of spousal support include: (1) past relations and conduct of the parties, (2) length of the marriage, (3) abilities of the parties

¹² *Perrin v Perrin*, 169 Mich App 18, 22; 425 NW2d 494 (1988).

¹³ *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999).

¹⁴ *Byington*, *supra* at 114-115.

¹⁵ See the Consolidated Omnibus Budget Reconciliation Act, 29 USC 1162 *et seq.*

¹⁶ MCL 552.23; *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003).

¹⁷ *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

to work, (4) source and amount of property awarded to each party, (5) ages of the parties, (6) abilities of the parties to pay alimony, (7) present situation of the parties, (8) needs of the parties, (9) health of the parties, (10) prior standard of living and whether either party is responsible for the support of others, (11) contributions to the joint estate, (12) fault in the causation of the divorce, (13) effect of cohabitation on a party's financial status, and (14) general rules of equity.¹⁸ In the absence of error, an appellate court must determine whether a dispositional ruling was fair and equitable under the circumstances of the case.¹⁹

B. The Need For Spousal Support

Alan Haxton argues that the trial court awarded Patricia Haxton substantial assets in the divorce, obviating her need for additional support. He further argues the trial court's findings of fact were insufficient. Contrary to these assertions, we conclude that there was ample testimony at trial regarding the amount of Patricia Haxton's monthly expenses. The trial court heard substantial testimony pertaining to the work history of the parties, their respective earnings, Patricia Haxton's health concerns and the impact on her ability to work, contributions of the parties, fault, and the age and length of the marriage. The trial court then awarded short-term spousal support. Based on the trial court's articulation of the factors it deemed relevant to its determination, and the supporting evidence in the record, we conclude that the award of support is not inequitable under the circumstances.

Despite an award of substantial assets, when evaluating a claim for alimony, a court should not consider the value of assets awarded but should focus instead on their income-earning potential, in determining a party's ability to provide self-support.²⁰ While the trial court awarded Patricia Haxton the marital home and her inheritance, these assets do not generate substantial income. Michigan law does not require a spouse to invade for support the capital value of the assets awarded.²¹ We conclude that the trial court considered the proper factors in awarding support and in the distribution of property. As such, the awards are not in error and are equitable in light of the circumstances of the case.

Affirmed.

/s/ William C. Whitbeck

/s/ Jane E. Markey

¹⁸ *Olson, supra* at 631.

¹⁹ *Id.* at 629-630.

²⁰ *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995).

²¹ *Id.*